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No. 504

In the Supreme Court of the United States

OCTOBER TERM, 1958

CHARLES ALLEN TAYLOR, PETITIONER

v.

NEIL MCELROY, A. TYLER POST

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

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MEMORANDUM FOR THE RESPONDENTS

The petition for a writ of certiorari asks the Court to review a civil case pending on appeal in the Court of Appeals for the District of Columbia Circuit, prior to rendition of judgment by that court, as authorized by 28 U. S. C. 1254 (1) (Pet. 2).

Between February 21, 1941, and September 11, 1956, petitioner, a tool and die maker (milling machine operator) with the Bell Aircraft Corporation, held a "company confidential" security clearance granted by the Corporation in accordance with a security agreement then in effect between the Government and the Corporation (S. Ex. 3).[1] This clearance

[1] The letter "S" refers to the Stipulation of Facts entered into by the parties.

granted petitioner access to "confidential" defense security information (*ibid.*). In order to utilize petitioner on a defense contract requiring clearance for access to "secret" defense security information, the Corporation, in the proper manner, requested petitioner's clearance for access to such information (*ibid.*).

On September 10, 1956, petitioner was advised by the Director of the Office of Industrial Personnel Security Review of the Department of Defense that his existing clearance had been suspended (S. Ex. 7). At the same time petitioner was presented with a detailed "Statement of Reasons" (S. Ex. 7) and was advised that he could reply thereto in writing under oath and submit affidavits by third parties and such other documentary evidence as he might desire in support of his answer (S. Ex. 7). He was further advised that he was entitled to a hearing on the "Statement of Reasons" at which he could appear by counsel, or in person, or in person with counsel, and present evidence in his own behalf including testimony and witnesses (*ibid.*). On September 11, 1956, petitioner's employment with Bell Aircraft was terminated by the Corporation (S. Ex. 8).

On November 1, 2 and 14, 1956, petitioner received a hearing in accordance with the provisions of the Industrial Personnel Security Review Regulation (20 Fed. Reg. 1553) (S., par. 12). On June 14, 1957, he was advised that, on the available information, the granting of clearance to him for access to classified defense information "is not clearly consistent with the interests of national security" (S. Ex. 14). At this

time Bell Aircraft was advised by the Director of the Office of Industrial Personnel Security Review that the decision in petitioner's case was not intended to prevent him from performing such non-classified work as the Corporation might have available for him (S. Ex. 13). On June 14, 1957 petitioner was legally free to institute suit in the District Court, for his administrative remedies were then exhausted. However, instead, on November 22, 1957, petitioner elected to again set in motion the administrative processes of the Review Regulation (20 Fed. Reg. 1553) by requesting the respondent McElroy to reverse the June 14, 1957 determination (S. Ex. 15).

Prior to February 3, 1958, an investigation was instituted to obtain any additional information that might be available and of value in assisting the respondent McElroy to rule on petitioner's request of November 22, 1957 (S. Ex. 17). On April 17, 1958, the Court of Appeals decided the case of *Greene* v. *McElroy*, 254 F. 2d 944, now pending in this Court on writ of certiorari granted October 27, 1958, No. 180, October Term, 1958. On April 24, 1958—and despite the pendency of the administrative proceedings instituted at petitioner's request—petitioner instituted his suit in the District Court.

On May 30, 1958, respondent McElroy rescinded the June 14, 1957 determination and ordered further proceedings conducted under the provisions of the aforementioned Review Regulation (S. Ex. 18). On June 19, 1958, petitioner was served with an Amended Statement of Reasons (S. Ex. 23). Petitioner re-

plied thereto on June 25, 1958 (S. Ex. 24). Hearings thereon were held on July 11, 1958 (S., par. 30) and August 1, 1958 (S., par. 33). A final administrative determination revoking "confidential" and denying "secret" clearance to petitioner was made on October 13, 1958. On October 14, 1958, the District Court ruled that the respondents were entitled to judgment as to a matter of law under the "controlling ruling" of the *Greene* case, *supra* (Pet. App. 16–17).

On October 14, 1958, petitioner filed his Notice of Appeal, and the record was docketed in the Court of Appeals on October 16, 1958.

Petitioner concedes that the substantial issues involved in this case are already before this Court in *Greene* v. *McElroy*, *supra*, in which certiorari recently was granted (Pet. 9–12). Petitioner seeks to invoke the provisions of Rule 20 of the Rules of this Court, not because this case and its issues require immediate settlement from a standpoint of "imperative public importance," for he recognizes that the principal issue which he raises—the confrontation issue—is already before the Court for review. The justification advanced for deviating from the normal appellate processes is that the record in this case would provide a broader factual basis, when coupled with the record in *Greene*, for this Court's determination of the issues raised in *Greene* (Pet. 12).

However, the petition itself demonstrates the similarity of the issues here and in *Greene* and the likelihood that this Court's decision in *Greene* will illuminate or be dispositive of the questions which would be raised here by both the petitioner and the respondents

We do not believe that this case, taken by itself, warrants the "extraordinary" action of certiorari before judgment (*Hamilton Shoe Company* v. *Wolf Brothers*, 240 U. S. 251, 258), as did the cases cited in Rule 20 of this Court's Rules. Nevertheless, we recognize that the Court has granted such petitions in cases where the same issue was already before the Court in another case. Cf. *White* v. *Mechanics Securities Corp.*, 269 U. S. 283, 299; *Johnson* v. *United States Shipping Board*, 280 U. S. 320, 324–325; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 411–412, 415, n. 2; *United States* v. *Bankers Trust Co.*, 294 U. S. 240, 243; *Porter* v. *Dicken*, 328 U. S. 252; *Brown* v. *Board of Education*, 344 U. S. 1, 3; *Kinsella* v. *Krueger*, 350 U. S. 986, 351 U. S. 470, 473. Accordingly, since the *Greene* case is already before the Court on certiorari, we do not oppose the granting of the petition in this case.

We believe the Court should be informed that this case is now the subject of further review by the Departments of Defense and Justice, and within the near future administrative action thereon may be taken which could moot the case or materially alter the legal situation. In such eventuality the Court will, of course, be advised immediately.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

DECEMBER 1958.

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